SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 437

LOUIS L. ATKINS,
Plaintiff,

versus

GREENVILLE SHIPBUILDING CORPORATION,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No.

LOUIS ATKINS,

Plaintiff,

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Louis Atkins, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the granting of a summary judgment by the United States District Court for the Northern District of Mississippi.

OPINIONS BELOW

The District Court for the Northern District of Mis-

sissippi rendered an opinion which is reprinted as Appendix "A" hereof.

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment is reprinted as Appendix "B" hereof.

Pertinent excerpts from the depositions of respondent's superintendent, Harry Mason, are reprinted as appendix C hereof.

JURISDICTION

Original Federal jurisdiction of this cause was predicated upon the General Maritime Law of the United States, United States Constitution, Art. 3, § 2, Cl. 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Art, 3, § 2, Cl. 1; Federal Rules of Civil Procedure, 9H.

STATEMENT OF THE CASE

Petitioner, Louis Atkins, brought action against the defendant in admiralty, pursuant to F. R. C.P. 9H.

On and prior to July 26, 1966, plaintiff had been employed as a welder aboard defendant's floating drydock which was moored on a navigable body of water in Greenville, Mississippi, known as Lake Ferguson.

His complaint alleged that the drydock was a vessel and that on July 26, 1966, he was injured as a result of the vessel's unseaworthiness, basing his claim upon the doctrine enunciated by this Court in *Reed v. Yaka,* 373 U.S. 410; 83 S. Ct. 1349, 10 L. Ed. 2d 488 (1963). Defendant moved for and was granted a summary judgment. Petitioner appealed to the United States Court of Appeals, Fifth Circuit, which affirmed the dismissal of petitioner's action on May 12, 1969. Hence, petitioner files this application for certiorari.

REASONS FOR GRANTING THIS PETITION

The decision of the Fifth Circuit Court of Appeals in the above matter presents a clear-cut conflict with the decision of the 2d Circuit Court of Appeals in *Bernardo v. Bethlehem Steel,* (2 Cir. 1963) 314 F. 2d 604. Additionally, the Appellate Court's opinion is in conflict with the rationale and spirit of opinions of this Court, as well as other opinions of the Fifth Circuit Court of Appeals, itself.

ARGUMENT

It will be noted that the decision of the District Court and that of the Fifth Circuit Court of Appeals rest upon entirely different grounds. The trial court erroneously assumed that plaintiff was claiming a warranty of seaworthiness in respect to the Barge KCB 300 that was aboard respondent's drydock for repairs. Of course, petitioner made no such contention nor could one have been made. *Reed v. Yaka, supra,* is limited to an employer-owned vessel; respondent did not own the KCB

300. Petitioner's claim was based upon the assertion that respondent's floating *drydock* was a vessel.

Recognizing that the District Court's determination could not be sustained on the basis stated, the Appellate Court affirmed on a ground not even considered by the trial court and ruled on the central and only issue in this case and:

HELD AS A MATTER OF LAW THAT A FLOATING DRYDOCK IS NOT A VESSEL.

The Court of Appeals' decision is completely contrary to the *rationale* of this Court's decisions and indeed, in direct conflict with several of its own prior decisions.

In *Offshore Co. v. Robinson,* 266 F. 2d 769, (Cir. 5, 1959), an historic and landmark opinion, it was recognized that special purpose vessels and those who man them were subject to the same maritime rules as traditional vessels and crews. Eight years later this same Appellate Court in a forward-looking decision that weighed present day realities in the maritime field held that such special purpose floating objects *as a matter of law were vessels; Producers Drilling Co. v. Gray,* 361 F. 2d 432 (Cir. 5, 1967). This was followed in *Kellar v. U. S.,* 273 F. Supp. 945 (U.S.D.C. New Orleans Division) and *Boatel v. Delamore,* 379 F. 2d 850 (Cir. 5, 1967).

In light of the above, it is somewhat surprising that the Court's opinion in the case at bar harkens back to criteria that it rejected over a decade ago, i.e.:

(1) Lack of motive power;

(2) Permanent anchorage;

(3) The fact that the drydock was not designed primarily or used primarily for navigation or transportation.

Of course, dredges, derrick barges, submersible drilling rigs (and numerous other types of specialized watercraft):

(1) Have no motive power;

(2) Spend months and/or years at a single anchorage;

(3) Are obviously not designed primarily for navigation or the carriage of passengers and cargo.

Respondent's drydock is admittedly a large object, floating in navigable waters. It is capable of carrying passengers and cargo; it could be moved and used to transport goods and persons to any port in the world should its owner so desire. (See Appendix "C") The law is clear that:

> "The word 'vessel' includes every description of watercraft or other *artificial contrivance used or capable of being used*, as a means of transportation on water." (Emphasis added.)

Vol. 1, Norris, The Law of Seamen, 2d Ed. Sec. 9.

Respondent has relied heavily upon the argument that petitioner was not "doing a seaman's work and incurring a seaman's hazard" and this is reflected in the trial and Appellate Court opinions.

Historically, wooden sailing ships, included carpenters and shipwrights as regular crewmen. This was a necessity since in case of vessel damage at sea, on the spot repairs and reconstructions would be essential. But petitioner urges that this is not an issue before this Court. Oil field drillers, tool pushers, roustabouts, and derrick operators are hardly "*doing a seaman's traditional work*" — yet they admittedly are entitled to all maritime remedies if injured aboard a "vessel". See also, *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F. Supp. 909, 911-912 (E.D., La., 1963).

SUMMARY

In conclusion petitioner respectfully submits that the opinion of the Fifth Circuit creates an arbitrary distinction where no difference exists.

It is patent that this holding by the Fifth Circuit is in direct conflict with *Bernardo, supra,* which expressly held the exact same issue to be one for the jury. The Appellate Court appears to lose sight of the fact that the decisions involving drydocks, cited on page 8 of the opinion, *were fact findings, not summary adjudications.* Nor can the result be reconciled with the

Fifth Circuit's decision in *Producers' Drilling Co. v. Gray, supra,* except by forging a completely illogical rule to the effect that a special purpose craft drilling for oil, as a matter of law is a vessel but one engaged in vessel-repair, as a matter of law, is not.

We believe this Court's decision in *Butler v. Whitman,* 356 U.S. 271; 2 Fed. 2d 754 (1958), constitutes an express ruling by this Court that issues such as here presented are for the jury.

The true rationale of the opinion by the Appellate Court rests in its statement that: (Page 4)

> *"Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, *and its progeny, Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.,* 1956 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; *Reed v. The Yaka,* 1963, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448; *Jackson v. Lykes Bros. SS Co.,* 1967 386, U.S. 731, 87 S. Ct. 1419, 18 L. Ed. 2d 488, *has resulted in metastasis, if not emasculation of The Act's exclusiveness of remedies provision.*

The appellate decision disapproves of this Court's extension of the doctrine of seaworthiness and by its conclusions, not only seeks to turn back the clock, but will have created considerable inconsistency and confusion in this phase of the maritime law should the result remain unchanged by a ruling from this Court.

All of which is

Respectfully submitted,

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CERTIFICATE

I, the undersigned member of the Bar of this Court, hereby certify that three copies of the foregoing Petition have been served upon opposing counsel by depositing the same, air postage pre-paid, in the U. S. Mails, properly addressed at New Orleans, La., this ____ day of June, 1969.

Samuel C. Gainsburgh

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

LOUIS L. ATKINS,

Plaintiff,

versus

No. GC6732

GREENVILLE SHIPBUILDING CORPORATION,

Defendant.

ORDER

In accordance with the memorandum opinion of the court this day released, it is,

ORDERED:

1) That defendant's motion for summary judgment shall be, and is, sustained, and judgment in this cause shall be, and is hereby, entered for the defendant, with plaintiff to take nothing by his complaint which is hereby dismissed with prejudice.

2) Costs are awarded to defendant as they may in course be taxed.

This the 14th day of June, 1968.

(Signed) CLAUDE F. CLAYTON
CLAUDE F. CLAYTON
UNITED STATES
CIRCUIT JUDGE
Sitting by Special Designation
as District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

LOUIS L. ATKINS,

Plaintiff,

versus

No. GC6732

GREENVILLE SHIPBUILDING CORPORATION,

Defendant.

MEMORANDUM OPINION

This is an action for personal injuries allegedly sustained by the plaintiff as the result of the unseaworthiness[1] of a "vessel" owned and controlled by the de-

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[1]The doctrine of unseaworthiness and the owner's absolute liability for the lack of it was first announced in *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760:

> The vessel and her owners are . . . liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in proper order the proper appliances appurtenant to the ship.

fendant, Greenville Shipbuilding Corporation. The defendant is currently engaged in the business of designing, constructing and repairing marine vessels and was so engaged at the time of the plaintiff's injury. After answer, the defendant moved for summary judgment, and the merits vel non of this motion have been submitted on briefs, affidavits, the fruits of discovery and the pleadings and are now for resolution.

Factually, it appears that plaintiff received the injury complained of on July 26, 1966, while employed as a welder and a fitter performing repair work on the Barge K.C.B. 300. This repair work was being conducted on a floating dry dock which was built by the defendant and is situated adjacent to the bank of Lake Ferguson. Its position is stationary and is maintained by cables running from said dock to the bank of the lake.

This dock, as its name suggests, has the capacity of completely removing marine vessels from the water so as to permit repair to and inspection of their bottoms. It is undisputed that Barge K.C.B. 300 was so removed from the water and was so situated on the defendant's dry dock at the time of the injuries to the plaintiff. By uncontroverted affidavit, it is asserted that when said barge was delivered to the defendant's dry dock, it was empty of cargo and devoid of crew. It is also established that the dry dock has no power to propel itself and that the only way it could be moved would be through the use of an outside source of power, such as a towboat or other powered vessel.

However, it has not been moved from its final position where it was located when constructed in 1962.

As stated, while engaged in the repair of this barge, the plaintiff is alleged to have sustained his injury. His injury purportedly occurred when plaintiff, in ascending a ladder leading from the floor of the dry dock to the barge undergoing repairs, fell to the dry dock's floor. The ladder is said to have slipped causing this fall.

Following this accident, the plaintiff made a claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. As a result of this claim, plaintiff has received $2,941.30 in compensation benefits covering the period July 26, 1966, through June 13, 1967.

It is the defendant's contention, initially, in support of its motion that the plaintiff is an employee covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, et seq., and that as such, he is barred from bringing this action due to that act's exclusiveness of liability provision. This contention prompts an examination of the relevant sections of the act.

The section of said act dealing with coverage provides:

> Compensation shall be payable under this chapter with respect of disability or death of an employee, but only if the disability or death

> results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . .
>
> 33 U.S.C.A. § 903 (a).

An employer under the act "means an employer of any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)". 33 U.S.C.A. § 902 (4). It is well settled that workmen performing duties on dry docks are engaged in maritime employment at a place within the admiralty jurisdiction so as to render their death or injury compensable under this act. In *Flowers v. Travelers Insurance Company*, 258 F.2d 220 (5 Cir. 1958), the appellant was found to come within the coverage of the act. Factually, the appellant was injured while performing duties as a welder making repairs to a vessel while in dry dock. The court said:

> The setting was wholly maritime. The vessel, if not actually floating *in* navigable waters, was there in law. For she was in a floating dry dock which by all tests made the place of injury maritime. (Citing cases.) The work he was doing was maritime. (Emphasis supplied.) 258 F.2d at 221.

See also *Newport News Shipbuilding and Dry Dock Company v. O'Hearne Deputy Com'r*, 192 F.2d 968 (4 Cir. 1951); *Travelers Insurance Company v. McManigal*, 139 F.2d 949 (4 Cir. 1944). It is also clear, and the

court so holds, that Lake Ferguson is a navigable waterway, a fact which is within the judicial knowledge of this court. See *Lands v. A Cargo of 227 Tons of Coal*, 4 Fed. 478 (C.C. D.C.N.J. 1880). Accordingly on the undisputed facts here presented, the plaintiff was an employee "employed in maritime employment" who was engaged in employment within the navigable waters of the United States and, as such, is an employee covered by the act. As the Court of Appeals for this circuit recently noted:

> Injuries occurring on dry docks, which are located on navigable waters and used to raise the ship out of water to permit examination or repairs to its hull, impossible while the ship is afloat, are within Longshoremen's Act coverage by express statutory inclusion. (Citing cases.)
>
> *Travelers Insurance Company v. Shea*, 382 F. 2d 344 (5 Cir. 1967).

Thus, the plaintiff being an employee covered by said act, it would seem that he is precluded from bringing this action because of the act's exclusiveness of liability provision. This provision is rather emphatic and provides:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury or death . . . .
>
> 33 U.S.C.A. § 905.

In spite of this clear, unequivocal pronouncement, however, we are taught the perils of relying on the literal wording of congressional enactments by a number of cases teaching that, under certain conditions, persons covered by this act do have an independent remedy for damages for the failure to supply a seaworthy ship. *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S. Ct. 792, 90 L. Ed. 1099 (1946), is a landmark case in this regard.

In *Sieracki*, a stevedore employed by an independent stevedoring firm was injured while working aboard ship. Said stevedore was engaged in loading and unloading this ship when the accident occurred, and he brought suit against the ship's owner who was not his employer. The court held that the doctrine of unseaworthiness is not confined to seamen, but this doctrine extended to all workers "performing the ship's service". 90 L. Ed. at 1106. In so holding, the court noted that:

> Historically the work of loading and unloading is the work of the ship's service, performed until recent times by the members of the crew.

Id. at 1107.

The court further noted:

> It is that for injuries occurring while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections. . . . For these

> purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. . . . [h]is employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship.

Id. at 1108-1109.

As to the exclusiveness of liability provision in the Longshoremen's and Harbor Workers' Act, the court stated that said act "did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others". "We may take it therefore," said the court, "that Congress intended the remedy of compensation to be exclusive as against the employer" but not against a third person. *Id.* at 1110. This limitation, however, soon disappeared, for in *Reed v. Steamship Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963), the court held that the Longshoremen's Act and the exclusiveness of liability provision contained therein did not bar a longshoreman from suing his employer, as well as a third person, for unseaworthiness. See also, *Jackson v. Lyles Steamship Company*, 386 U.S. 731, 87 S. Ct. 1419, 18 L. Ed. 2d 488 (1967).

Nor has the court's ruling in *Sieracki* been limited to longshoremen participating in the loading and unloading of a ship, for in *Pope and Talbot, Inc., v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), the injured plaintiff was a carpenter employed to make

"minor repairs" on the grain loading equipment of a ship. The court expressly rejected the shipowner's argument that as the plaintiff was not a longshoreman and was not engaged in the act of loading the vessel and that the unseaworthiness doctrine was not applicable. The court stated:

> Sieracki's legal protection was not based on the name "stevedore" but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. . . . [the plaintiff's] need for protection from unseaworthiness was neither more or less than that of the stevedores then working with him on the ship or of seamen who have been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law.
>
> 98 L. Ed. at 152-153.

The court had occasion to again consider the doctrine of unseaworthiness in *United N.Y. and N.J. Pilots Association v. Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959). In *Halecki*, the vessel while undergoing its "annual overhaul" required work on its generators. The job on said generators required spraying with a toxic compound and was performed while there was no crew aboard. The plaintiff conducted the spraying and died later of poisoning. On the applicability vel non of the doctrine of unseaworthiness to this plaintiff, the court stated that:

> The work that he did was in no way "the type of work" traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was "dead" with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment. . . . [not] connected with a ship's seagoing operations.
>
> * * *
>
> To extend liability for unseaworthiness to the decedent here would distort the law of Mahnich, of Hawn and of Sieracki beyond recognition.
>
> *Id.* at 544-545.

Thus, in determining whether one other than a seaman is entitled to the protection and benefits of the doctrine of unseaworthiness, a fact of controlling importance is the character of the work being performed. If it is established that the work performed by one seeking to maintain an action for unseaworthiness is in the "ship's service," i.e., work which is traditionally the work of crew members of a vessel, then the unseaworthiness doctrine is available — the exclusiveness of liability provision of the Longshoremen's Act notwithstanding. In categorizing particular types of work as that traditionally of a crew, several factors are considered. The nature of the work itself, of course, is of paramount importance. But, collaterally, the courts also consider the status of the vessel upon which the work is being performed. Generally speak-

ing, extraordinary repairs to a ship — such as major overhauls or major reconstruction — have been categorized as work *not* traditionally that of the crew or not in the "ship's service". For example, in *Berryhill v. Pacific Far East Line*, 238 F.2d 385 (9 Cir. 1956), the court noted that "not all repairs are 'ship's work' to be performed historically or currently by the crew . . .". 238 F.2d at 387. The court in *Berryhill* further stated that "the repairs [there involved] were nothing of an improvised, hurried nature, done to save the ship work time, but were of sufficient importance to cause the ship to be dry-docked". *Ibid.* In *Halecki*, supra, the court's refusal to apply the doctrine of unseaworthiness was bottomed on the fact that the work there involved could not be performed while the vessel was at sea, but said work could only be accomplished on a "dead" ship. Additionally, the court in *Halecki* noted that the work there called for the skill of a specialist *with special equipment*. Regarding major repair work on a ship and the status of the repairmen, it has been stated that:

> Obviously there must be some limit, else the whole fabrication of a new ship would be included [within the *Sieracki* rule]. We can only say that the reconstruction of a ship was not traditionally the task of the crew.
>
> *Berge v. National Bulk Carriers Corporation*, 251 F.2d 717, 718 (2 Cir. 1958).

In *West v. United States*, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959), the court refused to extend the doctrine of unseaworthiness where the "undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier . . .". 4 L. Ed. 2d at 165.

In *Union Carbide Corporation v. Goett*, 256 F.2d 449 (4 Cir. 1958), the court held that an employee injured while sandblasting the deck surface of a barge which was at that time located on a repair dock was not entitled to the protection traditionally afforded seamen. In so holding, the court noted that said barge was not, at the time of the injury, subject to any of the perils of navigation, a prerequisite to the maintenance of an action based on unseaworthiness. In *Raidy v. United States*, 252 F.2d 117 (4 Cir. 1958), a shipyard worker sustained an injury while employed aboard defendant's vessel while in dry dock for major repairs. The court found that the character of work there was not customarily that of a crew since the ship was in dry dock for work which could not have been performed by the crew (which had at that time been discharged) and the ship at the time of the accident was not subjected to the perils of navigation. In *Warren v. Pacific Inland Navigation Company*, 204 F. Supp. 31 (D.C. Ore. 1962), a welder employed by a repair company to conduct extensive repairs on an unmanned steel barge in dry dock was injured when a ladder on which he had been standing slipped. He was denied the benefits of the doctrine of unseaworthiness by the court which

noted that the barge was not subject to any perils of navigation, that it had no navigation equipment and that it had been withdrawn from navigation for the purpose of making the changes.

In the present case, by uncontradicted affidavit, it is established that the repairs being conducted by the defendant to Barge K.C.B. 300 were the following: a section of the top knuckle, starboard side, was cropped out and renewed; two patches were fitted and welded on the port side of the bottom knuckle; three timberhead doublers were gouged off and renewed; one timberhead was reworked and cracks, both below and above the water line, were welded as needed. It is undisputed that at the time of his injury the plaintiff, who was employed as a welder and fitter, was engaged in making such repairs to this barge. It is also asserted that in order to do this work it was necessary that the barge be completely removed from the water. This fact also is not in dispute.

Thus, on the basis of this record, the following can be concluded: The plaintiff was engaged in repairs of such a character as to require the complete removal of Barge K.C.B. 300 from the water; these repairs could not have been performed at sea; special equipment unrelated to the barge's seagoing operations was required to accomplish these repairs; the assistance of the regular crew was not called upon; the barge upon which the repairs were being performed (and the dry dock, too, for that matter) was, during the course of said repairs, not subject to any of the perils of navigation; neither the barge nor the dry dock had at the

time of plaintiff's injury crew members aboard to assist in navigation and the repairs themselves involved replacement of or repair to major portions of the barge. Looking to the character of the work being performed by the plaintiff, it seems clear, and the court so holds, that he was at the time of his injury not engaged in work traditionally that of a seaman. Therefore, it follows that he is not one to whom the doctrine of unseaworthiness is available. Plaintiff having an adequate remedy under the Longshoremen's Act and not being one who can avoid its exclusiveness of liability provision, the present action based on unseaworthiness must fail.

In light of what has been said, it is not necessary to reach or deal with the other contentions of defendant.

There is no genuine issue as to any material fact, and defendant is entitled to judgment forthwith [Rule 56(c), Federal Rules of Civil Procedure], which will be rendered by separate order.

This the 14th day of June, 1968.

(Signed) CLAUDE F. CLAYTON
CLAUDE F. CLAYTON
UNITED STATES
CIRCUIT JUDGE
Sitting by Special Designation
as District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26550

LOUIS L. ATKINS,
Plaintiff-Appellant,
versus
GREENVILLE SHIPBUILDING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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(May 12, 1969)

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

DYER, Circuit Judge: Atkins, a shore-based welder and fitter employed on Greenville Shipbuilding Corporation's floating drydock, sustained injuries when a ladder, which he was using to ascend a barge brought onto the drydock for major repairs, slipped causing his fall to the drydock's floor. Although he received com-

pensation from Greenville under the Longshoremen's and Harbor Workers' Compensation Act,[1] Atkins, claiming to be a *Reed v. Yaka*[2] seaman not limited exclusively to the remedies of the Act, sued his employer Greenville for breach of the maritime warranty of seaworthiness, alleging that the floating drydock was a "vessel" and that the ladder was a part of its gear and tackle. Greenville moved for summary judgment on the grounds that no warranty of seaworthiness was owed to Atkins because the floating drydock was not a "vessel" and because Atkins was not doing a seaman's traditional work. The District Court granted the motion upon the latter ground; we affirm on the former.

Greenville Shipbuilding Corporation is engaged in the business of designing, constructing and repairing steel vessels, barges, towboats, floating drydocks and marine vessels at its shipyard on the banks of Lake Ferguson, a navigable waterway near Greenville, Mississippi, on the Mississippi River. As an instrument for the repair of vessels at its Lake Ferguson shipyard, during the years 1961-62 Greenville constructed a floating drydock which since that time has been floating upon the lake's waters, permanently affixed to the bank of the lake. The dock itself, a large flat surface, is lowered from its floating position within a steel frame by pumping water into watertight compartments. Next the vessel to be repaired is situated above it, after which the dock is raised by pumping air into

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[1] 33 U.S.C.A. §§ 901 et seq.

[2] *Reed v The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448.

the compartments. The buoyancy lifts dock and vessel for accessibility to repairmen. The drydock's position is maintained on the waterfront by cables running to the bank. It is in the exact position in which it was placed upon construction, and it was neither designed for nor used for navigation or transportation. The floating drydock is without motive power and could only be moved upon water from one place to another by being towed or by other outside power.

On July 26, 1966, the Barge K.C.B. 300 was placed on the drydock for major repairs to eliminate leaks, requiring among other things removal and replacement of two sections below her waterline and welding of various cracks. This work could only be done by removing the barge from the water.

Atkins, a welder and fitter employed by Greenville, worked on the barge that day. In mid-afternoon he began ascending a ladder leading from the floor, or "dock", of the floating drydock to the barge. The ladder slipped, and Atkins fell to the floor of the drydock, sustaining injuries.

As a result of the accident, Atkins made a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, and since filing the claim has received and accepted benefits of approximately three thousand dollars. On June 30, 1967, Atkins filed his complaint alleging injuries sustained due to the unseaworthiness of a "vessel" owned by Greenville, specifically alleging injuries resulting from a defective and unseaworthy ladder which was part of

the vessel's gear and tackle. Greenville defended the unseaworthiness claim upon the grounds that Atkins was not doing traditional seamen's work and that the floating drydock was not a "vessel". The District Court, finding no material facts to be in dispute, held that Atkins was not engaged in work traditionally that of a seaman and entered summary judgment in favor of Greenville.

Atkins is clearly within the compensation provisions of the Longshoremen's Compensation Act,[3] and Greenville is equally as clearly an employer under the Act.[4] However, Atkins seeks to avoid the Act's exclusiveness of liability section,[5] which quite explicitly would preclude any further recovery against Greenville, the employer, if the section is given its literal meaning. His technique of avoidance is manipulation of the doctrine of seaworthiness, which as amplified by *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and its progeny, *Ryan Stevedoring Co. v. Pan-*

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[3] The Act provides that compensation shall be payable "if the disability or death results from an injury occurring upon the navigable waters of the United States *(including any dry dock)* . . . . 33 U.S.C.A. § 903(a) (emphasis added). *See Avondale Marine Ways, Inc. v. Henderson*, 1953, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77; *Travelers Insurance Company v. Shea*, 1967, 382 F.2d 344, 347-48.

[4] 33 U.S.C.A. § 902(4) provides that an "employer" under the Act is an employer "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States *(including any drydock.)* [Emphasis added.]

[5] 33 U.S.C.A. § 905 provides in pertinent part:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . . .

Atlantic S.S. Corp. 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Reed v. The Yaka,* 1963, 373 U.S. 410, 83 S.Ct 1349, 10 L.Ed.2d 448; *Jackson v. Lykes Bros. Steamship Co.,* 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488, has resulted in metastasis, if not emasculation, of the Act's exclusiveness of remedies provision. In *Sieracki* the Supreme Court extended the scope of the maritime warranty of seaworthiness in favor of shore-based employees, including longshoremen, engaged aboard a vessel in work customarily or traditionally performed by seamen, thus allowing longshoremen under the Act to recover against third persons. *Reed* and *Jackson* extended the *Sieracki* extension to allow longshoremen, independently of the Act or its exclusiveness of remedies provision, to recover directly from their employers for injuries resulting from unseaworthiness where the employer is the owner of or has an operational interest in the vessel.

However, regard for the historical development of the warranty of seaworthiness and appreciation of the influences upon its development, from *The Osceola,* 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, through *Sieracki, Reed* and *Jackson,* reveals that Atkins cannot so easily ensconce himself within the expanded scope of the warranty. With the advent of an increasingly complex and dangerous maritime service it was held that the owners owed to the seaman the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition. *The Osceola, supra. See The State of Maryland,* 4 Cir. 1936, 85 F.2d 944. In *Sieracki,* by a willingness to recognize substance over form, the warranty was made applicable to those

"doing a seaman's work and incurring a seaman's hazards," *Sieracki, supra* at 99, despite "'the fortuitous circumstance' of their employment by one other than the owner to do the ship's work," or "more modern divisions of labor." *Id.* at 98, 96. Others doing a seaman's traditional work have been included within the warranty. *E.g., Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143. In addition to expanding the class of persons covered by the warranty, due to the emergence of special purpose craft, the vessels owing the warranty in recent years also have become more diverse; again through recognition of substance over form. *See Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769.

But despite expansions of the warranty because of the technical progress of the modern maritime service, tradition plays an important role. While the *Sieracki, Reed* and *Jackson* decisions in one sense expanded the scope of the warranty, implicit within their rationale is the limiting factor of tradition. The limitation requires that the injured shore-based worker be engaged in work traditionally that of a seaman, *United N.Y. and N.J. Pilots Association v. Halecki*, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541, excluding those persons performing such tasks as making major repairs requiring drydocking or special skills. *See West v. United States*, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed. 2d 161; *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 5 Cir. 1967, 377 F.2d 511, *Union Carbide Corporation v. Goett*, 4 Cir. 1958, 256 F.2d 449; *Berge v. National Bulk Carriers Corporation*, 2 Cir. 1958, 251 F.2d 717; *Berryhill v. Pacific Far East Line*, 9 Cir.

1956, 238 F.2d 385. By the same token, the craft or structure said to owe a warranty of seaworthiness must fall within the traditional category of "vessels". *Cf. Offshore Company v. Robison, supra* at 781.

Concentrating upon Atkins' duties in making major repairs to the barge placed on the drydock, the District Court held that Atkins was not engaged in work traditionally that of a seaman, hence denying recovery because he was outside the class of persons within the warranty's coverage. In doing so the District Court deemed it unnecessary to decide whether the floating drydock was a "vessel" owing a warranty of seaworthiness. We disagree with that approach.

In view of this Court's decision in *Offshore Company v. Robison, supra,* the initial determination must be whether the craft or structure upon which the shore-based worker was injured is a "vessel" owing a warranty of seaworthiness. Only following a determination that the craft or structure is a "vessel" does it become necessary to decide whether the worker's duties were those traditionally performed by seamen, *Halecki, supra,* or in the case of unconventional specialty craft, duties contributing to the accomplishment of the vessel's mission, *Offshore Company v. Robison, supra,* in which case the warranty of the vessel's seaworthiness would be owing to the plaintiff.

Although the District Court made no determination whether the floating drydock *sub judice* was a "vessel" owing a warranty of seaworthiness, since no material facts are in dispute as to the nature, purpose or charac-

ter of the structure this Court may make that determination. The appellant contests only the ultimate fact whether a floating drydock is a special purpose vessel owing a warranty of seaworthiness, not whether the floating drydock was in fact a floating drydock, and contends that the ultimate determination can only be made by a jury. We disagree and hold as a matter of law that the floating drydock *sub judice* was not a "vessel" owing a warranty of seaworthiness.

Since *Cope v. Vallette Dry Dock Company*, 1887, 119 U.S. 625, 7 S.Ct. 417, 30 L.Ed. 501, if not before, *Snyder v. A Floating Dry Dock*, D.N.J. 1884, 22 F. 685, it has been clear that a floating dry dock is not a "vessel". *Cope v. Vallette Dry Dock Company, supra*, held that a floating drydock was not a "vessel" for purposes of salvage. The same considerations are applicable to whether a warranty of seaworthiness is owed. "A fixed structure such as this dry-dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water." *Cope, supra* at 627. Mere flotation on water does not constitute a structure a "vessel" for purposes of salvage nor warranty of seaworthiness. The element of risk and exposure to the hazards of the sea, necessary for the operation of and common to both principles, is absent upon floating drydocks. *Compare Cope v. Vallette Dry Dock Co., supra* at 627-29, *with Seas Shipping Co. v. Sieracki, supra* at 93-95, 99. While ordinarily "attempts to fix unvarying meanings [that] have a firm legal significance to such terms as 'seaman', 'vessel', 'member of a crew' must come to grief on the facts," *Offshore Company v.*

Robison, supra at 779, no particular difficulties are here presented.

We find nothing in *Producers Drilling Company v. Gray*, 5 Cir. 1967, 361 F.2d 432, or *Bernardo v. Bethlehem Steel Company*, 2 Cir. 1963, 314 F.2d 604, which requires departure from the settled rule that a floating drydock is not a vessel. The former dealt with a barge, which it is well settled may be a vessel, *Producers Drilling, supra* at 435, and in *Bernardo* the Court was not called upon to make the determination we here make. *Supra* at 608.

AFFIRMED.

APPENDIX C

SUPPLEMENTAL INDEX

Q. Now, this is a floating structure, is it not?
A. Right. This on the inboard side, or the side toward the bank, we have an old government quarter boat — I don't know whether you are familiar with those boats.
Q. Now, referring to the dry dock, you can move this from place to place, can you not, by the use of tugs?
A. By using outside power.
Q. It could be moved from one mooring to another mooring?
A. Right.
Q. And, in the course of moving it from one mooring to another mooring, of course it would be

possible to move with it anything that happened to be aboard? In other words, if you had workmen aboard it, if you had vessels aboard it, or if you had anything else aboard it, they could be moved right along with the dry dock from one place to another, if you wanted to?

A. If you had enough power, yes.

Q. If you had the power. Wouldn't it also be possible if you wished to do so, to construct living quarters above the dry dock, if you wanted to have them there — ignoring whether it is customary to do it or not, if you wished to construct it?

A. It wouldn't be practical, because it would cut down on your work space.

Q. Conceding that, Mr. Mason, if you did wish for any particular reason to have living quarters aboard it, you could construct it, couldn't you?

A. You could build it, if you wanted to put it on there, yes, but it would, like I say, cut down on your work space.

Q. It wouldn't operate as efficiently as it operates the way you have it drawn?

A. That's right.

Q. And this dry dock, of course, is used exclusively for the repair and for working on vessels?

A. That's right.